APPENDIX A

No. 4879

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

SPECIAL PROCEEDING No. 108

APPEAL FROM FINAL JUDGMENT DATED JANUARY 30, 1969

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, Judge

McBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellees,*

vs.

AYLMER F. ROBINSON, et al., *Defendants-Appellees, Cross-Appellants.*

Petition for Rehearing on Behalf of Appellants, Selwyn A. Robinson, et al.

(Filed May 18, 1973)

Appellants SELWYN A. ROBINSON, et al., (hereinafter referred to as "G&R") present this petition for rehearing.

PRELIMINARY STATEMENT

The opinion of the Court decides questions not raised below or on appeal. It is a denial of due process of law and a taking of petitioners' property without just compensation.

GROUNDS FOR REHEARING

1. The decision overrules prior decisions holding:

a) The normal flow of a stream, subject to appurtenant and prescriptive rights is "normal surplus water"

and is the property of the owner of the ahupuaa or ili kupono on which the stream has its source;

b) That the owner of water rights may transfer the water to other places outside the watershed;

c) That Koula is an ili kupono, not a part of the ahupuaa of Hanapepe.

2. The rules laid down in the decision, a) the State owns all surplus water and b) there is no such thing as surplus water because each riparian owner has a right to flow of a river or stream in its natural shape and size, are inconsistent with each other and with the prior decisions of this Court;

3. The decision, if enforced, would deprive G&R of property without due process of law and without just compensation, contrary to the Fourteenth Amendment to the Federal and Article I of the State constitutions by:

a) Overruling earlier decisions holding that the normal surplus water of a stream belongs to the konohiki or owner of the land on which it arises and he is free to transfer it out of the ahupuaa and watershed, and that Koula is an ili kupono G&R and its lessees have relied upon earlier adjudications and expended over $1,000,000 on dams and ditches for the transportation of water from Hanapepe to Makaweli; and

b) By deciding issues which were neither raised nor tried below nor presented on appeal thus depriving G&R of an opportunity to present evidence or argument on the issues raised by the Court *sua sponte.*

4. The decision is contrary to the judgment of the Court of Appeals in *Territory of Hawaii* v. *Gay, et al.,* 31 Hawaii 376 (1930), *affirmed* 52 F.2d 356 (1931), *cert. denied* 284 U.S. 677 (1931), thereby failing to give full faith and credit to the judgment and depriving G&R of property without due process of law and without just compensation, and of the privileges and immunities of citizens of the United States contrary to Article IV, Section 1, Article VI,

clause 2 and the Fourteenth Amendment to the Federal Constitution and Article I, Sections 4 and 18 and Article XVI, Section 2 of the State Constitution and contrary to Article III and the Supremacy Clause of Article VI of the Federal Constitution and the Act of June 25, 1948, c. 646, 62 Stat. 947 (28 USC Sec. 1738) and Article XVI, Section 2 of the Constitution of the State of Hawaii.

5. The prior decisions of this Court that surplus water belongs to the konohiki and that water may be transported out of the ahupuaa and watershed, were in accordance with Hawaiian custom. These rules were developed in response to Hawaii's climate and geography, in which abundant supplies of water are found in watersheds unsuitable for agriculture or homes, but located near arid areas outside the natural watershed which were adapted to agriculture and homes if, but only if, a sufficient supply of water could be brought to them. The principles of riparian law announced in the present decision were laid down in England and Massachusetts to ensure water power in a climate and geography where irrigation was unnecessary and when transportation of water for domestic and urban purposes was nonexistent. This rule if applied in Hawaii would destroy the sugar industry and even the domestic water supply of many of Hawaii's towns. It would arbitrarily preclude the bringing of water to parts of Hawaii where the natural water supply is insufficient for human existence.

WHEREFORE, appellants pray that the Court vacate its opinion and enter a decision and judgment upon the issues before the Court on these appeals.

DATED: Honolulu, Hawaii, May 26th, 1973.

/s/ J. GARNER ANTHONY
J. Garner Anthony

/s/ JOHN H. R. PLEWS
John H. R. Plews

ANTHONY, HODDICK,
Of Counsel
REINWALD & O'CONNOR

Attorneys for Appellants
SELWYN A. ROBINSON, *et al.*

Certificate

I HEREBY CERTIFY that this petition is presented in good faith and not for delay.

/s/ J. GARNER ANTHONY
J. Garner Anthony
Attorneys for Appellants
SELWYN A. ROBINSON, *et al.*

APPENDIX B

Hawaiian Statutes

Hawaii Revised Statutes § 7-1
(Derived From Act of August 6, 1850, Sec. 7)

Building materials, water, etc.; landlords' titles subject to tenants' use. Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use. [CC 1859, § 1477; RL 1925, § 576; RL 1935, § 1694; RL 1945, § 12901; RL 1955, § 14-1]

Stat. L. Kamehameha III 81 et seq.
Reprinted Rev. L. Hawaii (1925), Vol. II,
Appendix 2124 et seq.

Principles Adopted By The Board of Commissioners To Quiet Land Titles in Their Adjudication of Claims Presented To Them

When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining however, a portion in his hands, to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs, or persons of rank, by whom they were subdivided again and again; after passing through the hands of four, five or six persons, from the

King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them. The proportions of these rights were not very clearly defined, but were nevertheless universally acknowledged.

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All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also, service which was called for at discretion, on all the grades from the highest down.

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It is therefore certain that the tenure was far from being allodial, either in principle or practice; . . . The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land; the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust. But when he put it in the hands of a third person, that third person bore a similar relation to him that he did to the King. The superior always had the power at pleasure to disposses his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place, except on the decease of one of the landlords.

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Such was the nature of the tenures, and such the titles by which the lands were held, when in 1839 protection was declared both for person and property, in the following words: "Protection is hereby secured to the persons of all the people; together with their lands, their building lots, and all their property." (See Declaration of Rights, p. 10 of translation.)

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It seems natural then, and obviously just, that the King, in disposing of the allodium, should offer it first to the superior lord, that is to the person who originally received the land in trust from the King; since by doing so, no injury is inflicted on any of the inferior lords or tenants, they being protected by law in their rights as before; and most obviously the King could not dispose of the allodium to any other person without infringing on the rights of the superior lord. But even when such lord shall have received an allodial title from the King by purchase or otherwise, the rights of the tenants and sub-tenants must still remain unaffected, for no purchase, even from the sovereign himself, can vitiate the rights of third parties. The lord, therefore, who purchases the allodium, can no more seize upon the rights of the tenants and dispossess them, than the King can now seize upon the rights of the lords, and dispossess them. This appears clear, not only from the first principles of justice, but also from the act of 1839, declaring protection for tenants as well as for landlords.

* * *

Although the above facts and principles are most perfectly clear and unquestionable, yet great evils have existed down to the present moment, owing mainly to the circumstance that several different classes of persons had undivided rights in the same lands, and each class was very liable to claim more than the due proportions. In such cases, lords, or persons of superior power or rank have generally been the oppressors, and perhaps there are none of those classes, from the throne down, who have not sometimes taken advantage of the powerless in this respect. Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank, were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered, and it was found necessary to adopt a new system for ascertaining rights, and new measures

for protecting those rights when ascertained, and to accomplish this object the Land Commission was formed.

The decisions of an executive board would be so far surrenders of the Chief Executive Magistrate, who has approved the powers conferred upon that Board, as to be an authorization from him to adjust all the past tenures in the manner most equitable, and if abstractly just, power to alienate for him any rights, which he as King could surrender in regard to these lands. The whole power of the King to confer and convey lands to which private equitable claim now attaches, is reposed in the Commission. What is the nature and extent of that power which the King has bestowed upon this board? It can be no other than his private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands, are the following:

1st. To punish for high treason by forfeiture, if so the law decrees.

2nd. To levy taxes upon every tax yielding basis, and among other lands, if so the law decrees.

3rd. To encourage and even to enforce the usufruct of lands for the common good.

4th. To provide public thoroughfares and easements, by means of roads, bridges, streets, etc., for the common good.

5th. To resume certain lands upon just compensation assessed, if for any cause the public good or the social safety requires it.

These prerogatives, powers and duties, His Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board, and the titles consequent upon them must be understood subject to these conditions.

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RESOLUTION OF THE LEGISLATIVE COUNCIL

The principles adopted by the Board of Commissioners to quiet Land Titles, under date of August 20th, 1846, having been read before the Nobles and Representatives of the people, in Legislative Council assembled, and having been carefully considered, it was,

Resolved, That the same are hereby approved; and it is enacted that from the date hereof, all claims for landed property in this kingdom shall be tested by those principles, and according to them be confirmed or rejected.

KAMEHAMEHA

KEONI ANA
Council House, Honolulu
Oct. 26, 1846

An Act To Organize the Executive Departments of the Hawaiian Islands. Part I. Ch. VII. Art. III. § VII. Hawaiian Stat. Laws 107 (1847) Reprinted Rev. L. Hawaii (1925) Vol. II. Appendix 2123; Repealed Civ. Code Hawaiian Islands. Ch. XL. § 1491 (1859)

The decisions of said board shall be in accordance with the principles established by the civil code of this Kingdom in regard to prescription, occupancy, fixtures, ... native usages in regard to landed tenures, water privileges. . . .

Enactment of Further Principles. Act of August 6, 1850. Reprinted Rev. L. Hawaii (1925) Vol. II. Appendix 2141-2142

AN ACT CONFIRMING CERTAIN RESOLUTIONS OF THE KING AND PRIVY COUNCIL, PASSED ON THE 21ST DAY OF DECEMBER, A. D. 1849, GRANTING TO THE COMMON PEOPLE ALLODIAL TITLES FOR THEIR OWN LANDS AND HOUSE LOTS, AND CERTAIN OTHER PRIVILEGES.

BE IT ENACTED by the House of Nobles and Representatives of the Hawaiian Islands, in Legislative Council assembled:

That the following sections which were passed by the King in privy council on the 21st of December, A. D. 1849, when

the legislature was not in session, be and are hereby confirmed; and that certain other provisions be inserted, as follows:

1. That fee-simple titles, free of commutation, be and are hereby granted to all native tenants, who occupy and improve any portion of any government land, for the lands they so occupy and improve, and whose claims to said lands shall be recognized as genuine by the land commission: Provided, however, that this resolution shall not extend to konohikis or other persons having the care of government lands, or to the house lots and other lands in which the government have an interest in the districts of Honolulu, Lahaina and Hilo.

2. By and with the consent of the King and the chiefs in privy council assembled, it is hereby resolved, that fee-simple titles, free of commutation, be and are hereby granted to all native tenants who occupy and improve any lands other than those mentioned in the preceding resolution, held by the King or any chief or konohiki for the land they so occupy and improve:

Provided, however, that this resolution shall not extend to house lots or other lands situated in the districts of Honolulu, Lahaina and Hilo.

3. That the board of commissioners to quiet land titles be, and is hereby empowered to award fee-simple titles in accordance with the foregoing resolutions; to define and separate the portions of lands belonging to different individuals; and to provide for an equitable exchange of such different portions, where it can be done, so that each man's land may be by itself.

4. That a certain portion of the government lands in each island shall be set apart, and placed in the hands of special agents, to be disposed of in lots of from one to fifty acres, in fee-simple, to such natives as may not be otherwise furnished with sufficient land, at a minimum price of fifty cents per acre.

5. In granting to the people, their house lots in fee-simple, such as are separate and distinct from their cultivated lands, the amount of land in each of said house lots shall not exceed one quarter of an acre.

6. In granting to the people their cultivated grounds, or kalo lands, they shall only be entitled to what they have really cultivated, and which lie in the form of cultivated lands; and not such as the people may have cultivated in different spots, with the seeming intention of enlarging their lots; nor shall they be entitled to waste lands.

7. When the landlords have taken allodial titles to their lands, the people on each of their lands, shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee-simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.*

Done and passed at the council house in Honolulu, this 6th day of August, A. D. 1850.

KAMEHAMEHA.

KEONI ANA.

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* This s. was amended by L. 1851, p. 98, by striking out the second sentence and also the words "should they need them" twice, and, slightly modified, it is C. C. 1859, s. 1477; Cp. L. s. 1477; C. L. s. 2136, s. 576 of this Revision. . . .